

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1353

To be argued by
WILLIAM M. ERLBAUM
Time Requested: 20 Minutes

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1353

In Re Grand Jury Subpoena Directing
EDWARD TAYLOR
To Appear And Testify Before A Grand Jury On
July 20, 1977 at 10:00 A.M.

APPELLANT'S REPLY BRIEF

LYON & ERLBAUM
Attorneys for Appellant Edward Taylor
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235

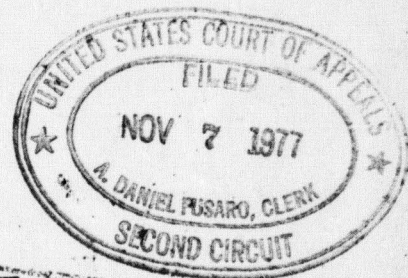


TABLE OF CONTENTS

	<u>PAGES</u>
Concerning the "Statement" of Facts - - - - -	1
POINT I - - - - -	4
CONCERNING THE SIXTH AMENDMENT RIGHT TO COUNSEL	
POINT II- - - - -	6
CONCERNING THE DUE PROCESS ARGUMENT	
POINT III - - - - -	10
CONCERNING THE GOVERNMENT'S POINT III	
POINT IV- - - - -	11
CONCERNING THE GOVERNMENT'S POINT IV	
POINT V - - - - -	12
CONCERNING THE GOVERNMENT'S POINT V	
CONCLUSION- - - - -	13
THE DISTRICT COURT'S ORDER SHOULD BE REVERSED.	

TABLE OF AUTHORITIES

CASES:

PAGES

Anonymous Numbers 6 & 7 v. Baker, 360 U.S. 287 (1959) - - - - -	5
United States v. Capaldo, 402 F.2d 821 (2d Cir. 1969)- - - - -	4
United States v. Jacobs, 531 F.2d 87 (2d Cir. 1976) on remand, United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976)- - - - -	5
United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768 - - - - -	2, 4

Treatises:

<u>Criminal Justice</u> , American Bar Association, Sumner, 1977 - - - - -	5
Marvin E. Frankel & Gary P. Naftalis, <u>The Grand Jury</u> (New York, 1975)- - - - -	4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
In Re Grand Jury Subpoena Directing

EDWARD TAYLOR

Docket No. 77-1353

To Appear And Testify Before A
Grand Jury on July 20, 1977, at
10:00 A.M.

-----x
APPELLANT'S REPLY BRIEF

Appellant respectfully submits this reply brief to
comment upon some of the contentions raised by the government
in its brief.

CONCERNING THE "STATEMENT" OF FACTS

The government states that Mr. Simon and Mr. Podell
are "targets" of its investigation and that there is "evidence
implicating" them (Government Brief, pp. 1 & 2). This is a
shifting of ground from the government's position before Judge
Bramwell. Then and theretofore (before Judge Neaher) the govern-
ment had denominated Mr. Joseph as a "target," (A9, A22).

Before Judge Neaher, the government had treated Simon
as a non-target. And before Judge Neaher, Mr. Podell was, in
effect, conceived of as a non-target.

Concerning immunity: On page 3, note 2, of the govern-
ment's brief, the government seeks to distinguish between the
decision of Judge Neaher (who had denied the government's motion

and who found that there was no conflict of interest between Messrs. Simon and Joseph, refusing to preclude either man from retaining Mr. Erlbaum's services) from the situation before Judge Bramwell by indicating in the proceedings before Judge Neaher, "the government had not advised Mr. Erlbaum that it intended to offer immunity to any of his clients then under investigation." However, at many points in its brief, the government shifts base from granting "immunity," as the test for finding a conflict, and suggests that the test is really whether one man is "pitted against" another. We agree with this latter test, and not with a test based upon a proposed grant of "immunity". In fact, it was Mr. Erlbaum who first introduced the "pitted against" test at the hearing before Judge Neaher. At that time, when the government posed a hypothetical argument to Judge Neaher based upon possible grants of "immunity," it was Mr. Erlbaum who suggested (as he does herein) that the "pitted against" test is the test of a conflict (Neaher Minutes, p. 18).

In addition to fudging the issue as to what the test of conflict of interest should be, the government makes too much of the entire issue of "immunity." First of all, it concedes a great deal when it introduces "immunity," for it would only be applicable to a potential defendant. A target of the investigation would have a bona fide right to plead the Fifth Amendment. United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768

at page 1776 (1976). Second, the record does not suggest or establish that Mr. Taylor (with Mr. Erlbaum as his counsel) would in fact invoke the Fifth Amendment. The pattern of extensive cooperation by his other clients herein (members of Mr. Taylor's family) is to the contrary (See appellant's brief, pages 4 & 14). Third, in the event that Mr. Taylor does invoke his privilege against self-incrimination, the government would have the right to take him before a Judge to determine its availability. Fourth, if the Judge said that the Fifth Amendment privileges were available, the Assistant United States Attorney could, if he was still so advised, request of the Department of Justice in Washington authority to grant "immunity," which might or might not be granted. Fifth, if "immunity" were granted, it would not be "immunity" from prosecution, but only "immunity" from use of Mr. Taylor's testimony and its "fruits." In light of this, the government states that its investigative grand jury, which has been in existence since June of 1976, is still studying the direct lease day care program of the City of New York which goes back to the 1960's. In such a wide ranging investigation, the government might well develop independent evidence against Mr. Taylor (if it has not done so already) rendering his "use" "immunity" useless.*

*/ It appears from the minutes of the hearing before Judge Bramwell (A10) that the government has already made a determination as to Mr. Taylor's role in the proceedings which leaves him the option of being either a government witness or a defendant. This will be covered in Point II, infra.

POINT I

CONCERNING THE SIXTH AMENDMENT RIGHT TO COUNSEL

The government's assertion that appellant has no Sixth Amendment rights at this stage of the proceedings is incorrect. The grand jury is part of the criminal process. This Court has held that a witness before the grand jury has rights under the Sixth Amendment which have been accommodated by the procedure of allowing him to have counsel outside the grand jury room with whom he may consult. United States v. Capaldo, 402 F.2d 821, at page 824 (1968) (Lumbard, C.J.)

This holding was made in a case in which an appellant complained that he was deprived of his Sixth Amendment rights because he was not allowed to have his attorney in the grand jury room with him. The court, recognizing that the Supreme Court had held that a witness before a grand jury was not entitled to representation by counsel in the grand jury room, did not dispute that the Sixth Amendment was involved but stated instead that the right to consult with counsel outside the jury room was sufficient accommodation to the Sixth Amendment rights of this witness which the court acknowledged.* /

* / In United States v. Mandujano, 96 S.Ct. 1768 (1976), a case relied on by the appellee, the prosecutor recognized the witness' right to have an attorney outside the grand jury room. He told the witness " . . . if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so choose. Now if during the course of this investigation, the questions that we ask you, if you feel you would like to have a lawyer outside to talk to let me know." (at p. 1772). See also, Marvin E. Frankel and Gary P. Naftalis, The Grand Jury (New York, 1975), pp. 59-69.

Moreover, in a more recent case this court implicitly recognized the Sixth Amendment right to representation by counsel when appearing as a grand jury witness - albeit, with counsel outside of the grand jury chamber instead of inside standing next to the client. United States v. Jacobs, 531 F.2d 87, at page 89 (2d Cir. 1976); and see Jacobs, on remand, United States v. Jacobs, 547 F.2d 772 (1976). See also, Anonymous Numbers 6 and 7 v. Baker, 360 U.S. 287, at page 296, in which an appellant's opportunity to have counsel outside of the testifying chamber (a disciplinary proceeding) instead of inside was accepted as an accommodation to the Sixth Amendment right to counsel. The government, in its Point I, is confusing the issue by discussing the witness' right to have a lawyer present in the grand jury room. The Sixth Amendment, concededly, does not give a grand jury witness that right. We have not asked for that right. That has not become an issue in this case. The issue in this case has always been and remains that of the representation of the witness by counsel outside of the grand jury chamber, in counsel's office, or in the witness' home. This Circuit has historically given witnesses such a right to counsel and stated that such a right satisfies the witness' Sixth Amendment right to counsel.*

*/ It is uncertain whether in the future witnesses will not be given the right to have counsel in the grand jury chamber. Such legislation (HR94) is presently under consideration and has been approved of, in principle by the American Bar Association. Criminal Justice, Summer, 1977, page 1.

POINT II

CONCERNING THE DUE PROCESS ARGUMENT

The government makes much to do that appellant's right to counsel arises from the Fifth Amendment rather than the Sixth Amendment. Suffice it to say that the government fails to cite a single authority to the effect that the "Due Process" right to counsel provides a witness with a lesser right to counsel than a Sixth Amendment right to counsel.

The main thrust of the government's Point II is that the court may legitimately deny Mr. Taylor the right to engage Mr. Erlbaum as counsel because in the instant case the government has interests that override Mr. Taylor's right to free choice of counsel. The suggestion is that Mr. Taylor's exercise of this free choice will result in a frustration of the grand jury proceedings. In arguing this point, the government cites instances in other cases of concealing information relative to the commission of crime (footnote 13, page 9); an attempt to thwart a grand jury investigation (Govt. Brief, page 9); to inhibit a witness (Govt. Brief, page 8); and to act collusively (Govt. Brief, page 9).

Appellant's answer is that there is nothing in this record that indicates that any of those abuses are taking place in the instant case.

The government's brief at page 7, attempts to minimize the District Court's prohibition as "only an incidental burden on appellant's interests in free speech, free association, and privacy . . ." (footnote 8). These "preferred rights" cannot be so easily shelved. Judge Bramwell's order goes far beyond mere representation. What are the limits of Judge Bramwell's order? Does it order Mr. Taylor to refrain from speaking to Mr. Erlbaum? Does it order Mr. Taylor to refrain from imparting information to Mr. Erlbaum which might aid his relatives who are being represented by Mr. Erlbaum? Does it order him to refrain from answering questions that might be put to him by Mr. Erlbaum in the process of attempting to continue an investigation of the matter at hand?

The Supposed Conflict of Interest.

The government's secret showing of their claim of conflict resulted in Judge Bramwell stating to Mr. Taylor that it appeared he would be called upon to implicate Mr. Erlbaum's other clients. Mr. Taylor was thus "placed on notice" that his testimony should conform to the government version of the facts. But unless the government and the District Court Judge have set themselves up as the finders of fact, they don't know what is in the mind of Mr. Taylor and what is known by Mr. Taylor to be the truth.

To suggest that Mr. Taylor is facing an indictment for perjury is tantamount to stating that Mr. Taylor will agree with other witnesses and join the ranks of the government witnesses or become a defendant.

The government cites the American Bar Association standards referring to the defense function, Section 345(b) (page 16 of the government's brief). Appellant's counsel is well aware of these standards and his obligation pursuant thereto. As the record will show, after the careful investigation called for by this section, Mr. Erlbaum determined that this was an "unusual situation" and that "it is clear that no conflict is likely to develop." Mr. Erlbaum received from the several clients "an informed consent to that representation," after explaining the nature of such representation and his obligations to them. Furthermore, out of an excess of caution Mr. Erlbaum, as the record again shows, advised Mr. Taylor to see the Judge in camera, and speak to Judge Bramwell who at the time had before him the government's affidavit and the grand jury minutes, neither of which had been available to Mr. Erlbaum or Mr. Taylor. Mr. Taylor spoke to Judge Bramwell in private with the assurance:

" . . . whatever you say here is said in confidence. The record is going to be sealed and no one will know what you have said and no one will know whether or not what I do is based on what you tell me or not. You see, whatever is said here is to be sealed." (A-31)

Notwithstanding, Mr. Taylor affirmed his position that he had nothing to hide. Judge Bramwell then unsealed his colloquy. Appellant submits that the record clearly shows if testimony is

available to the prosecution that Mr. Taylor has information incriminating to Mr. Erlbaum's other clients, that information is false^{*/} and therefore there is no conflict.

Mr. Taylor, on the record and through Mr. Erlbaum, has made a detailed showing of his legitimate interest in hiring Mr. Erlbaum as opposed to other counsel, to wit, the investigation involved an entire family unit, the members of which are and have been clients of Mr. Erlbaum for about ten to twelve years (A33). Mr. Erlbaum is intimately familiar with all of the facts of the case as they apply to all his clients. Mr. Erlbaum has represented them in prior investigations without any suggestion that a conflict existed in his representation of the family group.

In Footnote 15 (page 11 of the government's brief) the government suggests that if Mr. Taylor is looking to hire Mr. Erlbaum for the duration of the grand jury proceedings, he could rehire Mr. Erlbaum in the event he is indicted. If the government is in possession of any information that would suggest impropriety in Mr. Erlbaum's representation to the extent mentioned arguendo in its brief, the government would be obliged to ask Mr. Erlbaum to withdraw from the case. There has been no suggestion in the colloquy that any such impropriety exists and in fact the government has admitted Mr. Erlbaum's good faith before Judge Neaher (Neaher, J., Minutes, page 34).

^{*/} In the colloquy with Judge Bramwell in the presence of counsel, Mr. Taylor stated he would desire to be represented by Mr. Erlbaum even if that resulted in the U.S. Attorney's decision to deny him "immunity" which they might otherwise give (page A25, lines 10 through 24).

POINT III

CONCERNING THE GOVERNMENT'S POINT III

The entire Point is based on the government's assertion that it has acted in good faith, already demonstrating to appellant the broad contours of the conflict, and substantiating their assertion with grand jury testimony submitted privately to the court. This assertion begs the question. As we have attempted to demonstrate in Point II, there has been no such demonstration to appellant that a conflict of interest exists and the only conclusion we can draw from Judge Bramwell's statement concerning testimony submitted privately to the Court, is that another witness may be in conflict with Mr. Taylor. We submit, and this court can verify our claim by reading the grand jury minutes, that there is no showing that any of Mr. Erlbaum's other clients are in conflict with Mr. Taylor, nor he with them.

It often appears in a criminal case, and it may happen in this one, that the defense has available to it witnesses whose testimony is in conflict with witnesses available to the government. This does not put potential defense witnesses in conflict with defendants, even if the government chooses to make such witnesses co-defendants. If Mr. Taylor is acting in good faith (which should not be doubted) and is questioned concerning other testimony given to the grand jury, the truth of which he questions, he would have a right to talk to other members of his

family, who may be co-defendants, about these questions. With or without Mr. Erlbaum, therefore, Mr. Taylor is perfectly free to disclose to his loved ones his own testimony (see, Federal Rules of Criminal Procedure, Rule 6E). In this respect the government's emphasis on grand jury secrecy (pages 14-16 and page 19, footnote 21) goes beyond any provision that Congress has made for secrecy in the grand jury.

POINT IV

CONCERNING THE GOVERNMENT'S POINT IV

The government contends that even though Taylor waived his interests in separate representation, he has no standing to waive various public interests affected by his retention of conflict laden counsel before the grand jury. In appellant's answer to the government's Point II and Point III, appellant has attempted to show this court that there is in fact no demonstrable conflict that counsel faces. Also, there has been no showing of any public interests affected by Mr. Taylor's retention of Mr. Erlbaum as counsel.* / It is interesting to note that in the

* / Appellant in his brief fully outlined the law of multiple representation before a grand jury and when a prosecutor may justifiably interfere with such a retainer (Appellant's Brief, pages 13-17, 20-27). The government in its answer failed to controvert this body of law or even discuss it. The United States Attorney now alludes to a vague public interest which it fails to claim below but is unable to either define it or document it in its brief.

appearance before Judge Bramwell, the government made no claim of a conflict between Mr. Taylor's interest and the public's interest. In fact the government protested that it was simply interested in protecting Mr. Taylor from what they considered to be a dangerous situation (A26). Mr. Taylor, being informed of this concern and as much of the government's reason for this opinion as they were willing to give, and of Judge Bramwell's conclusion, given in chambers, reiterated his intention to be represented by Mr. Erlbaum. Mr. Taylor stood by his position, not out of stubbornness but out of his belief in the need to retain Mr. Erlbaum because of counsel's long-standing familiarity with the case and his interest in protecting Mr. Taylor. The government, in its footnote 22 on page 21 of its brief, suggests that it is not altogether clear that appellant's waiver was truly voluntary and intelligent. Certainly Judge Bramwell, who sat with appellant and talked to him, came to the conclusion that his waiver was so voluntary and so intelligent that he showed no hesitation in unsealing the colloquy which he had previously sealed.

POINT V

CONCERNING THE GOVERNMENT'S POINT V

Appellant has already shown in his brief to this court that there is a complete absence of any facts in the record to justify a conclusion by the District Court that the government had articulated a superior public or governmental interest which

justified denying appellant his First Amendment right to speak with his family and his lawyer, his Sixth Amendment right to representation by counsel, even if it is outside the jury chambers, and his Ninth Amendment right to privacy. Appellant reiterates that the District Court never stated that its decision - to prevent Mr. Taylor's retention of Mr. Erlbaum - was based on any overriding public consideration. This is understandable because the District Court had before it no testimony which would give a basis for such a ruling. The District Court's stated reason for the ruling was an alleged protection of Mr. Taylor's interests. Mr. Taylor sees his interests best served by Mr. Erlbaum's representation and any evidence the government has to the contrary as false. Furthermore, if the District Court had stated its ruling was based on a balancing of public interests as against Mr. Taylor's interests, we would assert that also was in error because the minutes show a complete absence of any statements on which such a ruling could be based.

C O N C L U S I O N

THE DISTRICT COURT'S ORDER SHOULD BE REVERSED.

Respectfully submitted,
LYON & ERLBAUM
Attorneys for Witness
EDWARD TAYLOR, Appellant
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235

